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No. 88-1308

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERTO VALERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence at trial established the existence of a single racketeering enterprise and a single racketeering conspiracy.

2. Whether the evidence was sufficient to establish the existence of a racketeering enterprise with an ascertainable structure distinct from the pattern of racketeering activity.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 845 F.2d 923.

JURISDICTION

The judgment of the court of appeals (Pet. App. A17) was entered on May 20, 1988. A petition for rehearing was denied on August 30, 1988. Pet. App. A18-A19. On October 28, 1988, Justice Kennedy granted an extension of time within which to file a petition for a writ of certiorari to and including November 28, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c) (Count 1), and conspiring to commit that offense, in violation of 18 U.S.C. 1962(d) (Count 2). He was also convicted of two counts of interstate travel with intent to facilitate an unlawful activity, in violation of 18 U.S.C. 1952 (Counts 8 and 9).[1] He was sentenced to consecutive 15-year terms of imprisonment on Counts 1 and 2, and concurrent terms of four years' imprisonment on Counts 8 and 9. In addition, he was fined $25,000 on each of Counts 1 and 2.

1. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A2-A3) and in the government's brief in the court of appeals (Gov't C.A. Br. 5-10). It showed that petitioner was associated with a group of people that specialized in the transportation and importation of controlled substances. The group operated from June 1979 until April 1983. Petitioner's activities in connection with the group took place in 1981 and 1982, when he directed the importation of large amounts of cocaine and hashish using the group's services.

In February 1981, petitioner met Scott McKenney, who was at that time a U.S. Customs officer. For several years, McKenney had been using his knowledge of customs procedures to facilitate the transportation and importation of drugs into the United States. Petitioner asked McKenney to arrange the importation of a large shipment of cocaine

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[1] Petitioner was acquitted on one other count of interstate travel to facilitate an unlawful activity. Petitioner was tried alone; two of his co-defendants were fugitives and the others entered guilty pleas.

from petitioner's source in Colombia. McKenney knew several people that he called upon from time to time to help in drug importation ventures. For petitioner's operation, McKenney obtained the services of pilot Joseph Crawford and communications expert Danny Martin. In March 1981, Crawford flew 65 kilograms of cocaine from Colombia to Merritt Island, Florida, for petitioner. Martin installed the aircraft radar and provided communications support during the flight. Petitioner paid McKenney $70,000 for organizing the venture. Pet. App. A2; Gov't C.A. Br. 5.

During the spring and summer of 1981, petitioner met several times with McKenney, Crawford, and Martin. Petitioner discussed his plans for importing hashish aboard a freighter that would sail to a port in Delaware. Petitioner also planned to bring hashish from the Middle East into the United States via Belize. For the latter venture, petitioner hoped to use a large jet to transport the hashish to Belize, where the drugs would be transferred to smaller aircraft for importation into the United States. Pet. App. A3. McKenney advised petitioner on how to avoid interdiction for both ventures. Gov't C.A. Br. 5.

In the fall of 1981, petitioner directed Martin to travel to Delaware and set up communications equipment for the freighter venture. Petitioner also had Crawford fly a plane from Florida to Delaware to provide aerial security for the same operation. Martin maintained contact with the freighter as it approached the Delaware coast and notified petitioner when the drugs were eventually off-loaded. Pet. App. A3; Gov't C.A. Br. 6.

In the fall of 1982, petitioner directed Martin and Crawford to travel to Belize to make preparations for the Middle East hashish importation. Martin set up radar and communications at a clandestine airstrip. He and Crawford investigated the possibility of landing a large

jet on a nearby road, but they reported to petitioner that the road was too narrow to accommodate the landing gear of the large aircraft. Pet. App. A3; Gov't C.A. Br. 6-7. Petitioner then sent Martin to Senegal to set up communications equipment there. Pet. App. A3.

McKenney, Crawford, and Martin all testified against petitioner at his trial. They recounted in detail their association between 1981 and 1983 in drug smuggling operations. Throughout the period in which the group functioned together, McKenney used his U.S. Customs experience to provide security and to facilitate the importation of narcotics, Crawford acted as a pilot, and Martin served as a communications expert. At trial, Crawford characterized McKenney as his boss in the drug smuggling operations, and he characterized himself as Martin's boss. Martin testified that he worked primarily at Crawford's direction. McKenney testified that the three of them worked together. Gov't C.A. Br. 9-10.

2. On appeal, petitioner contended, inter alia, that although the indictment charged a single RICO enterprise and a single RICO conspiracy, the evidence at trial showed the existence of multiple independent enterprises and multiple conspiracies. The court of appeals rejected that argument, concluding (Pet. App. A11) that the evidence was sufficient for the jury to conclude "that but one enterprise and one overarching RICO conspiracy existed and that [petitioner] knowingly participated in the activities of this enterprise."

The enterprise in question, the court noted (Pet. App. A11), "existed as an informal sort of business that sold its services to transport and to import drugs into this country." Petitioner "became a 'customer' of the enterprise on several occasions, calling on the group to furnish their services to aid him in getting into America illegal drugs he had acquired or caused to be acquired elsewhere." *Id.* at

A12. The court noted (*ibid.*) that "[w]hile [petitioner] may have been unaware of all the persons participating in other ventures and unaware of their source of drugs and their plans for distribution, there was evidence in trial testimony from which the jury could conclude that [petitioner] was aware that others were using the enterprise—the informal group of McKenney and friends—to import drugs into the United States and that [petitioner] agreed to participate in such activities by using the services of the group in his own ventures." The court accordingly concluded that the evidence was sufficient for the jury to conclude "that [petitioner] agreed to participate and did participate, through at least two predicate acts, in the single enterprise of importing drugs into America for profit, as charged in the indictment" (*id.* at A13).

ARGUMENT

1. Relying on *Kotteakos* v. *United States*, 328 U.S. 750 (1946), petitioner renews his contention (Pet. 14-18) that the evidence at trial revealed the existence of multiple enterprises and multiple conspiracies, not the single enterprise and the overarching RICO conspiracy charged in the indictment. The court of appeals properly rejected this argument based on the evidence at trial. In any event, that factbound determination does not warrant further review. *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975).

The court of appeals found adequate evidence to support the jury's conclusion "that but one enterprise and one overarching RICO conspiracy existed and that [petitioner] knowingly participated in the activities of this enterprise" (Pet. App. A11). Crawford testified that the group existed as an informal business that sold its services to transport and import drugs into this country. He likened the group's

operations to a "pick-up" basketball game, composed of certain people who would be called upon to provide their particular services in various drug importation ventures as needed. The personnel who worked on any given importation might vary somewhat from venture to venture, but there nevertheless existed an overall group whose services were for sale for similar drug importations. *Ibid.*

Petitioner became a "customer" of this enterprise on several occasions, calling on the group to assist him in transporting into the country illegal drugs that petitioner had acquired elsewhere. The court of appeals correctly noted that, as a customer, petitioner could be guilty of violating the RICO statute by participating in the affairs of the enterprise through a pattern of racketeering activity. *United States* v. *Manzella*, 782 F.2d 533, 538 (5th Cir.), cert. denied, 476 U.S. 1123 (1986). The court also found that, although petitioner may not have known all the actors in the larger group who were working on other schemes, there was evidence to show that he was aware that others like himself were making use of McKenney's enterprise. Petitioner's agreement to participate in the activities of the enterprise could thus be inferred from his use of its services in his own ventures. Pet. App. A12. In short, the court of appeals correctly found an adequate basis in the evidence for finding that one overall enterprise and conspiracy existed for the single purpose of importing illegal drugs and that petitioner knowingly participated in the conspiracy and the affairs of that enterprise through a pattern of racketeering activity.

2. Relying on *United States* v. *Turkette*, 452 U.S. 576 (1981), petitioner also contends (Pet. 6-14) that the government failed to establish the existence of a RICO enterprise separate and distinct from the pattern of racketeering activity that was proved at trial. This conten-

tion is simply a slight variation on his first argument—that the government failed to establish the existence of a single enterprise and an overarching conspiracy—and it fails for the same reason.

a. The RICO statute requires proof not only of a pattern of racketeering activity but also of an "enterprise." A pattern of racketeering activity is a collection of acts (18 U.S.C. 1961(5)); an enterprise, by contrast, is either a legal entity or a collection of persons, including "any * * * group of individuals associated in fact" (18 U.S.C. 1961(4)). In *Turkette,* this Court discussed the distinction between the two elements in the course of holding that an "enterprise" does not have to have a legitimate purpose, but can be wholly illegitimate. The Court stated (452 U.S. at 583) that an enterprise "is an entity separate and apart from the pattern of activity in which it engages." In pointing out that the enterprise and the pattern of racketeering activity are two separate elements of a RICO violation, however, the Court in no way suggested that the enterprise could not be proved, as it was here, by showing that a continuing association of individuals who shared a common purpose acted together to commit a series of racketeering acts. Any such suggestion would have been inconsistent with the Court's holding that an enterprise may be a group of individuals associated for wholly illegitimate purposes. Moreover, the Court expressly recognized that the proof used to establish the pattern of racketeering activity "may in particular cases coalesce" with the proof offered to establish the enterprise element of RICO (*ibid.*).

The court of appeals properly concluded in this case that the government satisfied its burden of proving the existence of an enterprise distinct from the individual acts of racketeering committed by its members. As the court explained, the enterprise in question "existed as an informal

sort of business that sold its services to transport and to import drugs into this country" (Pet. App. A11). The personnel who worked on any given importation might vary somewhat from venture to venture, but there nevertheless existed an overall group whose services were for sale for similar drug importations (*ibid.*). The members of that enterprise had assigned roles: McKenney used his Customs experience to provide security and to facilitate the importation of narcotics, Crawford acted as a pilot, and Martin served as a communications expert. The enterprise even had an established hierarchy, whereby Martin reported to Crawford, and Crawford reported to McKenney. See Gov't C.A. Br. 9-10. The evidence was thus plainly sufficient to establish the existence of an "enterprise" within the meaning of the RICO statute.

b. Petitioner contends (Pet. 8) that, in order to establish the existence of an "enterprise," the government must show not only the existence of an entity separate and apart from the pattern of racketeering activity in which it engages, but also that the entity has "an ascertainable structure distinct from that inherent in the pattern of racketeering activity." It is not at all clear from that formulation what additional proof petitioner believes is required. The members of the enterprise in question here had distinct roles and operated in a hierarchical relationship. Such proof is surely sufficient to establish that the enterprise had an "ascertainable structure" which—because it persisted over time and was repeatedly reflected in the individual acts of racketeering—was distinct from those individual acts of racketeering.

None of the cases upon which petitioner relies (Pet. 8) demands any more proof of the existence of an enterprise than was presented here. In *United States* v. *Riccobene*, 709 F.2d 214, 222 (3d Cir.), cert. denied, 464 U.S. 849 (1983),

the court of appeals concluded that *Turkette* requires the government to prove that the enterprise has some sort of internal structure for making decisions and directing the affairs of the enterprise. The court then examined the evidence in that case and concluded that that requirement was satisfied by evidence that there was a leader and a group of supervisors, with different roles and responsibilities. "The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement." 709 F.2d at 224 (footnote omitted).

In *United States* v. *Bledsoe,* 674 F.2d 647, 665 (8th Cir.), cert. denied, 459 U.S. 1040 (1982), the court explained the "enterprise" requirement in terms quite similar to those used in *Riccobene:* "Th[e] distinct structure might be demonstrated by proof that a group engaged in a diverse pattern of crimes or that it has an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes."[2]

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[2] In *Bledsoe,* 674 F.2d at 666, the court overturned RICO convictions where "[a]t best, the Government has shown two separate associations of individuals without any overarching structure or common control." As already noted, just such an overarching structure is present in this case. Furthermore, in *United States* v. *Lemm,* 680 F.2d 1193 (1982), cert. denied, 459 U.S. 1110 (1983), the Eighth Circuit clarified the meaning of its opinion in *Bledsoe* in a way that made clear that the court was simply applying this Court's analysis in *Turkette.* The court in *Lemm* explained that an association of persons engaged in illegal activities can be an enterprise as long as the group has a common purpose, functions "as a continuous unit with more than sporadic contacts," 680 F.2d at 1200, and has a "structure distinct from that inherent in the conduct of a pattern of racketeering," *id.* at 1200-1201. Thus, the evidence need not include proof that the enterprise engaged in legitimate as well as illegitimate

Finally, in *United States* v. *Tillett,* 763 F.2d 628, 631 (1985), the Fourth Circuit found an enterprise in the "operational structure" of a drug trafficking enterprise, noting that the organization had specific functions for each member in the financing, importation, transportation, and distribution aspects of each venture, and that the smuggling techniques and details of the operation were virtually identical with each boatload.

Each of these three cases upon which petitioner relies holds that the enterprise element of RICO may be satisfied by proof similar to that present in this case. Petitioner claims, however, that two courts of appeals have found proof of an enterprise on a lesser showing. *United States* v. *Bagaric,* 706 F.2d 42, 55 (2d Cir.), cert. denied, 464 U.S. 840 (1983); *United States* v. *Weinstein,* 762 F.2d 1522 (11th Cir.), modified, 778 F.2d 673 (1985), cert. denied, 475 U.S. 1110 (1986). In fact, however, any differences among the cases appear to be simply semantic ones. In *Bagaric,* 706 F.2d at 55-56, the Second Circuit remarked that "the nature of the misconduct often provides the best clue toward defining the enterprise," and that "it is logical to characterize any associative group in terms of what it *does* rather than by abstract analysis of its structure." In *Weinstein,* 762 F.2d at 1537 n.13, the Eleventh Circuit stressed that *Turkette* does not require an enterprise to have a distinct, formalized structure, since this Court had specifically stated that the entity could be formal or informal in nature.

It is thus true that the Second and Eleventh Circuits, as well as other courts of appeals, have rejected the need to

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activities; all that is needed is that the proof show that the association of the co-conspirators goes beyond the "sporadic contacts" and the " 'minimal association' necessary to perpetrate the acts of racketeering." *Lemm,* 680 F.2d at 1200 (quoting *Bledsoe,* 674 F.2d at 664).

show a distinct, formalized structure in order to adequately prove a RICO enterprise. See, *e.g.*, *United States* v. *Williams*, 809 F.2d 1072, 1093-1094 (5th Cir.), cert. denied, 108 S. Ct. 228 (1987); *United States* v. *Qaoud*, 777 F.2d 1105, 1111-1116 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); *United States* v. *Mazzei*, 700 F.2d 85, 87-90 (2d Cir.), cert. denied, 461 U.S. 945 (1983); *United States* v. *DeRosa*, 670 F.2d 889, 895-896 (9th Cir.), cert. denied, 459 U.S. 1014 (1982); *United States* v. *Aleman*, 609 F.2d 298 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980). As noted above, however, the three cases cited by petitioner are not to the contrary. Although they require that the group have some kind of structure, those three decisions make clear that that requirement is satisfied even if the actual functioning of the group reveals nothing more than that the different actors in the enterprise perform specialized roles within an ongoing criminal association. Those courts have thus recognized, as the Court held in *Turkette*, that an enterprise may be informal in nature, and that it often will be when it is formed for the purpose of carrying out illegal activities. In sum, all the courts of appeals are applying *Turkette*'s directive to ensure that the government proves both the existence of an enterprise and a pattern of racketeering activity, while recognizing, as *Turkette* also pointed out, that the proof of these two elements may well "coalesce" in particular cases. 452 U.S. at 583. And the enterprise proved in this case, which had a clearly defined internal structure and a continuing existence over a several-year period of time, would have satisfied any of the formulations used to describe the enterprise element.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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